

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

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CASE NO. 31-CA-167294

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**NORTHROP GRUMMAN SYSTEMS CORPORATION,**

Respondent,

and

**PORFIRIA VASQUEZ, an Individual,**

Charging Party.

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**RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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Dated: October 21, 2016

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Pursuant to Section 102.35(a)(9) of the NLRB's Rules and Regulations and the Division of Judges Orders dated September 2, 2016 and September 27, 2016, Respondent Northrop Grumman Systems Corporation ("Northrop" or "the Company") respectfully submits this brief on a jointly stipulated record to Administrative Law Judge Eleanor J. Laws.

### **INTRODUCTION**

The Complaint at issue alleges that Northrop violated Section 8(a)(1) of the National Labor Relations Act (the "NLRA" or "Act") by maintaining and enforcing its Employee Mediation/Binding Arbitration Program ("DRP"). For the reasons set forth below, the allegations in the Complaint are without merit.

Preliminarily, these proceedings should be stayed. An irreconcilable Circuit Court split now exists and it is highly likely the United States Supreme Court will soon grant certiorari and make a binding determination on whether the Counsel for the General Counsel ("CGC") has a legal basis for its claims. As a result, staying this matter will prevent the future (and potentially unnecessary) expenditure of the Board's and the Company's time and resources.

To the extent that ALJ Laws does not stay these proceedings, this matter presents the opportunity to correct the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) ("*D.R. Horton I*"), which incorrectly found that an employer's use of an agreement that precludes employees from utilizing class or collective procedural mechanisms to litigate employment claims violates the Act. The Board's holding in *D.R. Horton I* is not supported by the Act, conflicts with multiple federal statutes and court decisions, and is contrary to longstanding policy favoring the private arbitration of disputes.

Moreover, the Board's unsound logic in *D.R. Horton I* is particularly inapplicable in this matter because the DRP expressly preserves the Section 7 and other rights of Northrop's employees. The DRP makes clear that it does not "apply to or cover claims . . . [a]s to which an

agreement to arbitrate such claims is prohibited by law; [or that are] [c]overed under the National Labor Relations Act and within the exclusive jurisdiction of the National Labor Relations Board. . . .” [Joint Motion and Stipulation of Facts (“Joint Motion”) ¶ 5(f); Joint Exhibit 2, SOF p. 54 and Joint Exhibit 3, SOF p. 66] The DRP further assures employees that it does not “limit [their] right to file a charge or complaint with a governmental agency.” [Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67] Notwithstanding a limited class action waiver in jurisdictions where such a waiver would be permitted, the DRP facilitates the efficient adjudication of substantive employment claims – at Northrop’s expense – and permits employees to exercise their Section 7 rights in connection with those claims. As proof of how Northrop’s DRP works in practice, the Charging Party in this matter is actively pursuing her substantive employment claims in an arbitral forum and has identified both current and former Northrop employees as witnesses she intends to use to support her claims. [Joint Motion ¶¶ 5(n) and (o); Joint Exhibits 9 and 10] Notably, Charging Party has never asserted any class or collective claims at any time.

Simply put, there is no legal or factual basis from which to conclude that the maintenance and enforcement of the DRP violates the Act. The Complaint should be dismissed in its entirety.

### **STATEMENT OF THE CASE**

On January 7, 2016, Charging Party Porfiria Vasquez filed the underlying unfair labor practice charge against Northrop in which she alleged that Northrop violated the NLRA by maintaining work rules that prevent its employees from engaging in protected concerted activity (the “Charge”). [Joint Ex. 1(a)] On June 27, 2016, the Regional Director of Region 31 issued a Complaint alleging that Northrop’s DRP violates the NLRA. [Joint Ex. 1(d)] Northrop filed its Answer on July 11, 2016, which denied the Complaint’s allegations. [Joint Ex. 1(f)]

On August 31, 2016, the parties filed a Joint Motion and Stipulation of Facts with the Division of Judges. On September 2, 2016, Associate Chief Administrative Law Judge Gerald

Etchingham ordered the parties to file their respective briefs by October 7, 2016. In that Order, he also assigned Administrative Law Judge Eleanor J. Laws to preside over this matter. On September 27, 2016, Associate Chief Administrative Law Judge Gerald Etchingham granted the parties an extension until October 21, 2016 to file their respective briefs.

### **ISSUE PRESENTED**

Whether Northrop violated the Act by maintaining and enforcing the DRP even though the DRP expressly excludes claims under the NLRB's jurisdiction as well as claims for which an agreement to arbitrate class or collective matters is prohibited by law.

### **STATEMENT OF FACTS**

#### **I. THE PARTIES AND PROCEDURAL HISTORY**

Northrop is an aerospace and defense contractor with operations throughout the United States, including operations within the jurisdiction of the Fifth Circuit. [Joint Motion ¶ 5(b)] Charging Party was employed by Northrop from 2004 until October 2015. [Joint Motion ¶ 5(g)]

On or about August 15, 2015, Charging Party filed a Complaint against Northrop in the United States District Court for the Central District of California, Case No. 2:15-CV-05926-AB-AFM (the "Federal Court Action"). [Joint Motion ¶ 5(i); Joint Exhibit 4] On or about October 6, 2015, Charging Party filed a First Amended Complaint in the Federal Court Action. [Joint Motion ¶ 5(j); Joint Exhibit 5] Neither the Complaint, nor the Amended Complaint named any other Northrop employees as plaintiffs other than Charging Party. [Joint Exhibits 4 and 5]

On or about December 17, 2015, Northrop filed a Motion to Compel Binding Arbitration ("Motion") in the Federal Court Action, which Charging Party opposed. [Joint Motion ¶¶ 5(k) and (l); Joint Exhibits 6 and 7] On March 4, 2016, the District Court granted Northrop's Motion. [Joint Motion ¶ 5(m); Joint Exhibit 8] Charging Party currently is pursuing her individual claims in an arbitration, which is scheduled to begin on April 24, 2017. In anticipation of the arbitration,

Charging Party has identified both current and former Northrop employees that she intends to call as witnesses to support her claims. [Joint Motion ¶¶ 5(n) and (o); Joint Exhibits 9 and 10]

## II. NORTHROP'S DRP

Northrop has utilized the DRP since September 2006. [Joint Exhibits 2 and 3] While Charging Party acknowledged that compliance with the DRP was a condition of employment, she did not receive any discipline or adverse employment action as a result of her failure to comply with the DRP. In fact, Northrop has not disciplined or terminated any current or former employees for filing a class, collective, or joint action or complaint. [Joint Motion ¶ 5(p)]

The DRP states in part:

**Claims Covered:** This Program does not apply to or cover claims . . . [a]s to which an agreement to arbitrate such claims is prohibited by law; [or that are] [c]overed under the National Labor Relations Act and within the exclusive jurisdiction of the National Labor Relations Board. . . .

**Class Action Claims:** To the extent it is permissible to do so in the jurisdiction where the arbitration is held and (if applicable) the jurisdiction where the parties' obligation to arbitrate claims under this Program is enforced, both you and the Company waive the right to bring any covered claim under this Program as a class action. In jurisdictions where this is permissible, the arbitrator will not have authority or jurisdiction to consolidate claims of different employees into one proceeding, nor shall the arbitrator have the authority or jurisdiction to hear the arbitration as a class action.

[Joint Exhibit 2, SOF pp. 54 and 62, and Joint Exhibit 3, SOF pp. 66 and 74]

The DRP also expressly states that it does not prevent employees from bringing claims before government agencies, including the NLRB. [Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67] Moreover, the DRP provides for the full and expeditious adjudication of all employment related claims (at Northrop's expense) that do not fall within the NLRB's jurisdiction. [Joint Exhibit 2, SOF p. 60 and Joint Exhibit 3, SOF p. 72]

## ARGUMENT

### **I. THIS MATTER SHOULD BE STAYED PENDING SUPREME COURT GUIDANCE ON THE ISSUE PRESENTED.**

In 2013, the Fifth Circuit rejected the very theory pursued by the CGC in this matter. *See D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) (“*D.R. Horton IP*”) (denying enforcement in relevant part of *D.R. Horton I*). The Second and Eighth Circuits also expressly rejected the Board’s reasoning in *D.R. Horton I* and found that class action waivers for FLSA claims are enforceable. *See Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 298, n. 8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013). In 2015, the Fifth Circuit again rejected the CGC’s theory of liability. *See Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1014 (5th Cir. 2015) (“*Murphy Oil IP*”) (refusing to enforce in relevant part the Board’s decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (“*Murphy Oil P*”). On June 2, 2016, the Eighth Circuit also refused to enforce the Board’s determination that a class or collective action waiver of employment-related disputes violated the Act. *See Cellular Sales of Missouri, LLC v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016). Just last month, the Second Circuit affirmed the District Court’s rejection of the argument that a mandatory arbitration provision violated an employee’s substantive rights under the Act. *See Patterson v. Raymours Furniture Co., Inc.*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 14, 2016).

To the contrary, both the Seventh Circuit and the Ninth Circuit have erroneously adopted the Board’s position that arbitration agreements violate the NLRA if they prevent employees from bringing class claims. *See Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). On September 2, 2016, Epic Systems filed a Petition for Writ of Certiorari with the United States Supreme Court. On September 8, 2016, Ernst & Young filed a Petition for Writ of Certiorari

with the United States Supreme Court. The next day, on September 9, 2016, the NLRB sought Supreme Court review of the Fifth Circuit's decision in *Murphy Oil II*. Approximately two weeks later, on September 22, 2016, the plaintiff in *Patterson v. Raymours Furniture Co., Inc.* sought Supreme Court review of the Second Circuit's decision in that matter.

Given the irreconcilable split among the Circuit Courts and pending Writs, the Supreme Court likely will grant certiorari in the very near future. Accordingly, in the interests of preserving both the government's and the Company's resources, Northrop respectfully requests a stay of these proceedings pending a determination by the Supreme Court.

## **II. THE BOARD INCORRECTLY DECIDED *D.R. HORTON I*.**

Because the Board's decision in *D.R. Horton I* was wrongly decided, Northrop encourages ALJ Laws to use this matter as the basis for the Board to distinguish (and correct) its previous decisions. For the reasons outlined below, ALJ Laws should determine that Northrop's DRP does not violate the Act as alleged.

### **A. The Act Does Not Grant Employees The Right To Utilize Class Action Procedures.**

The NLRA does not grant employees unfettered access to class procedures. Rather, the Board's authority under the NLRA is limited and its interpretation of the Act must be rational and consistent. *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994) (noting that the Board's interpretation was irrational and inconsistent with the Act); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (rejecting the Board's interpretation of the NLRA); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202-04 (1986) (same); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317-318 (1965) (same). Because the Act does not provide employees a non-waivable right to class adjudication procedures, the Board exceeded its authority in *D.R. Horton I*. *See NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (a Board

decision must be rational and consistent with the NLRA and not an “unauthorized assumption . . . of major policy decisions properly made by Congress”).<sup>1</sup>

Specifically, the Board in *D.R. Horton I* reasoned that “the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation.” *D.R. Horton I, supra*, at 2. The Board fundamentally erred, however, by failing to distinguish between employee rights to: (1) collectively **assert** legal rights in an attempt to obtain concessions concerning the terms and conditions of their employment; and (2) seek and obtain a collective **adjudication** of their employment-related legal claims. While the NLRA protects the former, it does not protect the latter.

The adjudication of legal claims is not a bargaining process; it is “[t]he legal process of resolving a dispute; the process of judicially deciding a case.” *Adjudication*, Black’s Law Dictionary (9th ed. 2009); *see also Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (“A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights

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<sup>1</sup> The Board reached this conclusion notwithstanding the repeated contrary interpretations by its own agents. Specifically, the Regional Director in *D.R. Horton I* initially dismissed the underlying charge partially because “application of the class action mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant.” RD’s partial refusal to issue complaint on Michael Cuda’s unfair labor practice charge, dated Aug. 28, 2008, Resp’t Ex. 3 in *D.R. Horton, Inc.’s Record Excerpts, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (No. 12-60031). The ALJ in *D.R. Horton I* also correctly observed there was not “any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims” and the Acting General Counsel argued to the Board that “an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concerted challenge of the agreement.” *D.R. Horton I, supra*, at 23; Acting General Counsel’s Reply Brief to Respondent’s Answering Brief at 1-2, dated April 25, 2011, *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (No. 12-CA-025764) (emphasis added); *see also* GC Memorandum 10-06 at 7 (stating that employees may waive all rights to file class arbitration and litigation, if they can concerted challenge the enforceability of the agreement containing the waiver without retaliation).

and duties intact and the rules of decision unchanged”). The legal procedures by which claims are adjudicated are wholly unrelated to the Section 7 concern with equalizing bargaining power. Rather, adjudicatory procedures like those provided by the Federal Rules of Civil Procedure serve other purposes and are subject to other concerns well-beyond the Board’s authority.

Significantly, the Board in *D.R. Horton I* correctly recognized that Section 7 cannot grant employees a “right to class certification” and that an employer can lawfully oppose its class certification without violating the Act because its employees **already** exercised their Section 7 rights to concertedly “seek” class certification. *D.R. Horton I, supra*, at 12 (noting that Section 7 only guarantees employees the limited right “to take the collective action inherent in **seeking** class certification, whether or not they are ultimately successful under Rule 23” and “to act concertedly by **invoking** Rule 23, Section 216(b), or other legal procedures”) (emphasis added). The Board in *D.R. Horton I* could not, however, explain what the purported right to “seek” class certification and “invoke” class procedures meant in practice or how it furthered the purpose of the NLRA. That is likely because the creation of this new Section 7 “right” is arbitrary, capricious, and not found anywhere in the Act.

Notably, the Board in *D.R. Horton I* ignored the fact that class action procedures are rarely suitable for litigation over the bargained-for terms of non-unionized employment. In reality, class certification is routinely denied with respect to breach of contract and similar claims by at-will employees because such claims are inherently individualized. For example, in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009), the Eleventh Circuit reversed an order granting class certification and noted that the plaintiff could “not utilize identical evidence on behalf of every member of the class to prove offer, acceptance, consideration, or the essential terms.” The court explained:

Instead, these mandatory elements of each class member's claim depend on such individualized facts and circumstances as when a given employee was hired, what the employee was told (and agreed to) with respect to compensation rules and procedures at the time of hiring, the employee's subjective understanding of how he would be compensated and the circumstances under which his compensation might be subject to charge backs, and when and how any pertinent part of the employee's compensation agreement or understanding thereof may have changed during the course of that employee's tenure at T-Mobile.

*Id.* In actuality, courts regularly find contract claims by employees who are not subject to a collective bargaining agreement to be incompatible with class and collective action procedures.<sup>2</sup>

The Board in *D.R. Horton I* also failed to rationally explain the difference between an employee's failure to obtain class certification under the Federal Rule of Civil Procedure and the inability to utilize class action procedures because of a motion to enforce a class action waiver. In both instances, the employee(s) **already will have taken** "the collective action inherent in seeking class certification" and **already acted** concertedly by "invoking" class certification procedures. Thus, a class action waiver does not abridge a purported right to

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<sup>2</sup> See also *Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1, 10 (Md. Ct. Spec. App. 2007) (affirming denial of class certification in missed-breaks case, in part, because "absent a contract applicable to the entire class of Wal-Mart employees, the existence, formation, and terms of any implied employment contract would vary among employees" and "the alleged breaches of these implied contracts by supervisors and managers at individual Wal-Mart stores also give rise to individual, not common, factual and legal issues"); *Wal-Mart v. Lopez*, 93 S.W.3d 548, 557 (Tex. App. 2002) (reversing trial court's certification of class action as abuse of discretion in missed-breaks case because, among other things, "[a]ny determination concerning a 'meeting of the minds' [on a breach of oral contract claim] necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did"); *Cohn v. Massachusetts Mut. Life Ins. Co.*, 189 F.R.D. 209, 215 (D. Conn. 1999) (no predominance where the resolution of plaintiffs' breach of contract claims was dependent upon the representations made to each plaintiff individually); *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990) (finding that commonality was not met where "[i]t [was] not only conceivable, but probable, that [the] court [would] be required to hear evidence regarding the existence, terms, modifications and limitations of each alleged contract of the over 5,000 prospective class members").

concertedly “seek” class certification and “invoke” class procedures any more than a successful opposition to class certification.

Finally, the Board failed to explain how putative class or collective complaints filed by individuals, but in which no motion for certification is ever filed, no other individual ever joins the case, and which are settled as single-plaintiff lawsuits, constitute concerted activity. It is apodictic that there must be concerted action for Section 7 to apply. *See Meters Indus., Inc. v. Prill*, 268 NLRB 493, 497 (1984) (requiring an employee to act “with or on the authority of other employees, and not solely by and on behalf of the employee himself” to fall under Section 7 protections).<sup>3</sup>

**B. The Board’s Decision In *D.R. Horton I* Violates Several Federal Statutes.**

The Board’s decision in *D.R. Horton I* conflicts with numerous federal statutes that are outside the Board’s jurisdiction and expertise. As a result, ALJ Laws should refuse to apply *D.R. Horton I* to Northrop’s DRP for this additional yet independently sufficient reason.

**1. *D.R. Horton I* Fails To Comply With The Federal Arbitration Act.**

*D.R. Horton I* was incorrectly decided because the Federal Arbitration Act (“FAA”) requires that arbitration agreements like Northrop’s DRP be enforced. The FAA expressly states that such agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution.” *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011). The overarching purpose of the FAA “is to ensure the enforcement of

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<sup>3</sup> To the extent that *200 East 81st Rest. Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (July 29, 2015) is to the contrary, it should be overruled because it conflicts with the Federal Rules of Civil Procedure, the FLSA, and actual litigation practices.

arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

Under the FAA, parties are generally free, as a matter of contract law, to agree to the procedures governing their arbitrations. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (noting that parties to an arbitration agreement may “specify by contract the rules under which that arbitration will be conducted”); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (“Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes”).

Pursuant to Section 2 of the FAA, a court may deem an arbitration agreement invalid for such things as “fraud, duress, or unconscionability.” *Concepcion*, 131 S. Ct. at 1746. However, complaints about the “[m]ere inequality in bargaining power” between an employer and employee are insufficient to void an arbitration agreement. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Similarly, the Supreme Court repeatedly has rejected challenges to the “adequacy of arbitration procedures,” concluding that such attacks are “out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” *Id.* at 30. A party to an arbitration agreement “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Id.* at 31 (citation omitted). As a result, an arbitration agreement is enforceable even if it permits less discovery than in federal courts, and even if a resulting arbitration cannot “go forward as a class action or class relief [cannot] be granted by the arbitrator.” *Id.* at 31-33; *see also Vilches v. The Travelers Cos., Inc.*, 413 F. App’x 487, 494 & n.4 (3d Cir. 2011); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.

2002); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001). Simply put, state and federal courts “must enforce the [FAA] with respect to all arbitration agreements covered by that statute.” *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). “That is the case even when federal statutory claims are at issue, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citation omitted).

## **2. The Norris-LaGuardia Act Does Not Trump The FAA.**

The Board in *D.R. Horton I* wrongly concluded that the Norris-LaGuardia Act (“NLGA”) voided employment arbitration agreements with class action waivers and partially repealed the FAA so that it does not apply to employment arbitration agreements containing class action waivers. *See D.R. Horton I, supra*, at 7-8, 16. The NLGA is “outside the Board’s interpretive ambit,” 737 F.3d at 362 n.10, and as *Murphy Oil I* conceded, the Board is not entitled to deference in interpreting the NLGA. *See Murphy Oil I, supra*, at 8. Moreover, the *D.R. Horton I* Board failed to cite any court decision treating the NLGA as repealing the FAA. Thus, the Board’s novel interpretation of the NLGA should be rejected.

Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions “in a case involving or growing out of a labor dispute,” except as provided therein. *See* 29 U.S.C. § 101. The NLGA further provides that “yellow-dog” contracts – contracts in which an employee agreed “not to join, become, or remain a member” of a labor organization and agreed his employment would terminate if he did – are unenforceable in federal courts. *See id.* § 103. The statute also provided that any agreement “in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.” *Id.*

Notably, when the NLGA was adopted in 1932, the Federal Rules of Civil Procedure, the FLSA, and the modern class action device did not yet exist. To suggest the NLGA's public policy manifests any intention that employees have a substantive, non-waivable right to invoke class procedures that had not yet been adopted is patently unreasonable. The Board's analogy in *D.R. Horton I* to "yellow-dog" contracts also falls flat. If an employee promises to arbitrate individually and is hired, but then files a class action lawsuit, an arbitration agreement does not provide the employee's employment will terminate for having done so, as would occur under a "yellow-dog" contract. Rather, an employer will simply move to compel individualized arbitration under the FAA without any effect on employment status whatsoever.

Even assuming some conflict might exist between the NLGA and the FAA, it would be up to courts, not the Board, to resolve that conflict between two federal statutes outside the Board's jurisdiction. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013) (on employer's motion to compel arbitration under the FAA, addressing employee's challenge to enforceability of individual arbitration agreement based in part on NLGA). Moreover, if a conflict existed between the NLGA and the FAA, courts would likely "reconcile" the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970). Indeed, the Supreme Court has made clear that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. *See id.* at 250 (concluding that the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration"). Thus, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction would have to give way in light of the FAA and subsequent developments – especially because an arbitration agreement with a

class action waiver is clearly not “the type of situation to which the Norris-LaGuardia Act was responsive.” *Id.* at 251-52

Finally, the Board in *D.R. Horton I* addressed the wrong chronology in evaluating whether the NLGA and/or the NLRA should be viewed as partially repealing the FAA. *D.R. Horton I* assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D.R. Horton I, supra*, at 8. Therefore, if the FAA conflicted with either of those statutes, the Board in *D.R. Horton I* reasoned the FAA must have been repealed, either by the NLGA’s express provision repealing statutes in conflict with it or impliedly by the NLRA. *See id.* at 16 & n.26. However, the Board in *D.R. Horton I* failed to account for the dates when the NLRA and the FAA were re-enacted which are essential to a valid analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding “[i]n the event of irreconcilable conflict” between the two statutes, the former would prevail). The NLGA was enacted in 1932, the NLRA was re-enacted on June 23, 1947, and the FAA was re-enacted on July 30, 1947. *See* 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Accordingly, of these three statutes, the FAA would prevail if there was “irreconcilable conflict” among them.

The Board in *Murphy Oil I* stated that the FAA’s reenactment in 1947 should not be viewed as altering the scope of the NLGA or NLRA. The Board reasoned that “[i]t seems inconceivable that legislation effectively restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice.” *Murphy Oil I, supra*, at 15. However, *D.R. Horton I* and *Murphy Oil I* nevertheless assume the NLGA’s enactment in 1932 and the NLRA’s in 1935 restricted the scope of the 1925-enacted FAA with respect to the enforceability of arbitration agreements “without debate or even notice.” Rather than speculating as to which statute silently and impliedly repealed or amended the other, it is far more plausible to read the

NLGA and NLRA as not in conflict with the FAA because neither of those statutes concerns the enforceability of individual employment arbitration agreements.

### 3. *D.R. Horton I* Conflicts With The Rules Enabling Act.

*D.R. Horton I* also is at odds with the Rules Enabling Act (“REA”), in which Congress delegated authority to the Supreme Court to promulgate the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2072(b). The REA expressly provides that the Federal Rules “shall not abridge, enlarge or modify any substantive right.” *Id.* In light of the REA’s restriction, the Supreme Court has made clear that Federal Rule of Civil Procedure 20 (permissive joinder) and Federal Rule of Civil Procedure 23 (class actions) regulate **only procedure** and do not impact substantive rights. In *Shady Grove*, a plurality of the Supreme Court explained that a rule of procedure is valid under the REA only if it “really regulat[es] procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” 559 U.S. at 407. The plurality opinion reasoned:

Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid [under the REA]. *See, e.g.*, Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such rules neither change plaintiffs’ separate entitlements to relief nor abridge defendants’ rights; they alter only how the claims are processed. For the same reason, Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action – falls within § 2072(b)’s authorization. A class action, no less than traditional joinder (of which it is a species), **merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.**

*Id.* at 408 (emphasis added).

The Board in *D.R. Horton I*, however, improperly held that employees possess a **substantive** right under the NLRA to class action procedures. *See D.R. Horton I, supra*, at 12

(“Any contention that the Section 7 right to bring a class or collective action is merely ‘procedural’ must fail”). Since the NLRA does not create class action procedures, employees could not have any purported right to bring a class action in federal court **but for** Federal Rule of Civil Procedure 23. Thus, the Board’s treatment of Rule 23 as expanding employee substantive rights under the NLRA is contrary to the longstanding principle that the Federal Rules of Civil Procedure are valid only insofar as they “really regulat[e] procedure” and directly conflicts with the Rules Enabling Act.<sup>4</sup>

#### 4. ***D.R. Horton I* Conflicts With The Federal Rules Of Civil Procedure.**

*D.R. Horton I* also is at odds with the interpretation of Federal Rule of Civil Procedure 23, the Federal Rules generally, and other standards governing procedures for adjudication. Courts have repeatedly held that litigants do not have a substantive right to class action procedures under the Federal Rules, and have further held that such procedures are waivable. *See e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims”); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) (“A class action is merely a procedural device; it does not create new substantive rights”), *rev’d on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). State class action procedures are treated similarly. *See Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (no “substantive right to pursue a class action, in either Texas state or federal

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<sup>4</sup> *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (“[N]o reading of the Rule can ignore the [REA’s] mandate . . . .”). Moreover, to the extent the Board concluded that employees possess a substantive right under the NLRA to class action and joinder procedures created under **state** law, the Board’s interpretation impermissibly treated state law as modifying and enlarging substantive rights under a federal statute. *See Shady Grove*, 559 U.S. at 409 (“[O]f course New York has no power to alter substantive rights and duties created by other sovereigns”).

court”). Problematically, the Board in *D.R. Horton I* disregarded the substantial precedent interpreting procedural rules and statutes outside the Board’s jurisdiction and expertise.

Additionally, the Board’s treatment of litigation procedures as non-negotiable maxims is inconsistent with longstanding practices under the Federal Rules. Those Rules (and their state counterparts) generally permit, and sometimes mandate, that litigants negotiate regarding the procedures governing the adjudication of their disputes. *See* Fed. R. Civ. P. 16(b) & (c) and 26(f) (allowing parties to agree on procedures governing case); Fed. R. Civ. P. 29 (allowing parties to stipulate to changes in discovery procedures); Fed. R. Civ. P. 37(a)(1) (requiring parties to attempt to agree on resolution to discovery disputes before seeking court action).

Parties in litigation frequently negotiate, and courts routinely enforce, agreements regarding class procedures, including agreed scheduling orders setting deadlines for motions for certification or permissive joinder, agreements extending the time in which employees may move for certification, stipulations as to the scope of any certified class, agreements by the parties as to the time period during which opt-ins in FLSA collective actions may file their consents to join a case or during which putative members of classes may file their notices to opt out, and stipulations and settlement agreements dismissing class allegations on agreed terms. Under the novel rule adopted by the Board in *D.R. Horton I*, such routine agreements would be invalid because they narrow or waive purported non-negotiable rights under the NLRA.

Incredibly, the Board in *D.R. Horton I* found that employees have not only a substantive right under the NLRA to invoke class action procedures, but also the right to have their motions for certification **decided on their merits according to the requirements of Federal Rule of Civil Procedure 23**. *See D.R. Horton I, supra*, at 10 & n.24; *see also Murphy Oil, supra*, at 6. Any such right would prohibit employers from opposing an individual employee’s class action complaint with a Rule 12(b) motion or a wide variety of procedural and substantive defenses

unrelated to the requirements of Rule 23 as well as limit a court's ability to rule on such issues. For instance, some local rules require that motions for class certification be filed within 90 days of a class action complaint. *See, e.g.*, N.D. Ohio L.R. 23.1(c); C.D. Cal. L.R. 23-3; S.D. Ga. L.R. 23.2. Courts may deny certification motions for failing to comply with such requirements. *See Walton v. Eaton Corp.*, 563 F.2d 66, 75 n.11 (3d Cir. 1977) (noting that the district court did not abuse its discretion in denying motion for certification as untimely); *Batson v. Powell*, 912 F. Supp. 565, 570-71 (D.D.C. 1996) (denying motion for certification as untimely). However, if employees have a substantive right to have certification motions decided on their merits, these local rules would be moot.

In *Murphy Oil I*, the Board explained that its concern is “with employer-imposed restraints that would preclude employees from seeking to use [group litigation] mechanisms.” *Murphy Oil I*, *supra*, at 22. Under the Board's logic in *D.R. Horton I* and *Murphy Oil I*, an employer that makes an offer of judgment for the purpose of mooting the claims of a putative class or collective action plaintiff before he or she moves for class/collective action certification – thereby creating an employer-imposed restraint on group litigation mechanisms – would commit an unfair labor practice. That is not (and cannot be) the law. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (holding that a single employee's putative collective action under the FLSA was moot as a result of the employer's offer of judgment). *D.R. Horton I* also is contrary to Supreme Court and other precedent holding that parties are generally free to agree to the procedures that will govern their arbitrations. *See Volt Info. Sciences, Inc.*, 489 U.S. at 479; *Baravati*, 28 F.3d at 709.

## **5. D.R. Horton I Conflicts With The FLSA.**

The Board's decision in *D.R. Horton I* also conflicts with the FLSA's collective action procedures which repeatedly have been found not to provide unwaivable substantive rights. In

concluding that employers and employees are not permitted to agree to arbitrate FLSA claims individually, the Board in *D.R. Horton I* failed to consider that individual arbitration is fully consistent with the purposes underlying Section 216(b)'s current structure. *See* 29 U.S.C. § 216(b). Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to limit the number of collective actions and require employees who participate in such actions to provide their individual consent to be a party-plaintiff. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (observing that Congress enacted Section 216(b) to limit private FLSA actions to employees who assert claims in their own right and freeing employers of the burden of representative actions). There is no rational basis for finding that an arbitration agreement waiving class procedures interferes with employees' purported right to engage in concerted activity any more than does the FLSA's own individual opt-in requirement.<sup>5</sup>

The Board in *D.R. Horton I* also failed to discuss the procedures that govern collective actions under the FLSA (and, by incorporation, the ADEA). The FLSA does not establish any procedures for identifying and notifying putative collective action members of their opportunity

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<sup>5</sup> *See Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 350–51 (4th Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (holding that an arbitration agreement was not unenforceable under the FAA where it required employees to arbitrate their FLSA claims individually because “the inability to proceed collectively” did not “deprive[] them of substantive rights available under the FLSA”); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Horenstein v. Mortg. Mkt. Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001); *Copello v. Boehringer Ingelheim Pharm. Inc.*, 812 F. Supp. 2d 886, 894 (N.D. Ill. 2011) (“[W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action”); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164-65 (S.D.N.Y. 2008) (holding that the opt-in procedures of FLSA are procedural, not substantive); *Sjoblom v. Charter Commc'ns, LLC*, No. 07-CV-0451, 2007 WL 4560541, at \*5-6 (W.D. Wis. Dec. 19, 2007) (concluding that the opt-in provisions of § 216(b) are not clearly substantive); *Westerfield v. Washington Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, at \*1 (E.D.N.Y. July 26, 2007) (“Section 216(b) by its terms governs procedural rights”).

to opt-in to an FLSA collective action. Rather, such procedures have been developed by courts through their inherent authority to manage cases. *See Hoffmann-La Roche Inc.*, 493 U.S. at 165. Indeed, the various *ad hoc* procedures for “certifying” a Section 216 collective action have been developed by federal courts applying their discretionary authority.<sup>6</sup> However, the Board in *D.R. Horton I* found that employees have a substantive right under the NLRA to invoke these *ad hoc* procedures without explanation. Such fundamentally flawed logic cannot be countenanced. The Act cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures, which are developed by courts in their discretion.

**C. The Board’s Decision In *D.R. Horton I* Conflicts With Binding Supreme Court Precedent And Decisions From Other Federal Courts.**

The Board’s conclusion in *D.R. Horton I* that its ban on waivers is permissible under the FAA because the ban is not limited to arbitration agreements and therefore did not treat them “less favorably than other private contracts” conflicts with binding Supreme Court precedent. In *Concepcion*, the Supreme Court expressly rejected precisely this attempt to circumvent the FAA and struck down a nearly identical California rule prohibiting class action waivers. *See Concepcion*, 131 S. Ct. at 1746-48. *Concepcion* recognized that courts could exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. *See id.* at 1747. For instance, a court might find unconscionable all agreements that fail to provide for “judicially monitored discovery.” *Id.* “In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.” *Id.* To avoid this result, the Supreme Court

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<sup>6</sup> *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212-16 (5th Cir. 1995) (describing various methods used by district courts to determine whether employees are similarly situated in a collective action under the ADEA, which incorporates Section 216(b)), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90-91 (2003).

concluded that an arbitration agreement cannot be invalidated under the FAA based on a “preference for procedures that are incompatible with arbitration and ‘would wholly eviscerate arbitration agreements.’” *Id.* at 1748 (citation omitted).

Accordingly, a rule used to void an arbitration agreement is not saved under the FAA simply because it would apply to “any contract.” The proper test is whether a facially neutral rule prefers procedures that are incompatible with arbitration and thus “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* Applying this test, the Supreme Court in *Concepcion* held a rule mandating the availability of class procedures is incompatible with arbitration. *See id.* at 1750–52. In reaching this conclusion, the Supreme Court recognized that arbitration is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. The Supreme Court further noted that this informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *See id.* at 1751–52. Specifically, the Supreme Court held:

The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

*Id.* at 1748.

The Board in *D.R. Horton I* attempted to distinguish *Concepcion* by arguing its decision did not require class arbitration. *See D.R. Horton I, supra*, at 16. Rather, the Board claimed it required only the availability of class procedures in some forum, thus forcing employers to either (i) permit class arbitration, or (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *See id.* But that is a distinction without a difference. Like the California law addressed above, the *D.R. Horton I* Board “condition[s] the enforceability of certain arbitration agreements” on the availability of class procedures. *Concepcion*, 131 S. Ct. at

1744. The Board’s reliance on the option of avoiding class arbitration only by agreeing to forgo arbitration does not reduce the degree to which its ban on class action waivers “interferes with fundamental attributes of arbitration” and “creates a scheme inconsistent with the FAA.” *Id.* at 1748. To the contrary, requiring a party to abandon the arbitral forum altogether as the only way to avoid class arbitration is an even greater obstacle to the FAA’s policies than mandating class arbitration alone.

The Board in *D.R. Horton I* also incorrectly concluded an individual employment arbitration agreement should not be enforced because doing so would require employees to forgo a substantive statutory right in violation of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See D.R. Horton I, supra*, at 13. However, in considering whether arbitration would violate an employee’s substantive statutory rights, the Board reviewed the wrong statute (the NLRA rather than the FLSA), failed to ask the correct question (whether the employee could vindicate his or her FLSA rights effectively in arbitration), and came to the wrong answer (the arbitration agreement was unenforceable even if the employee could vindicate his or her FLSA rights effectively in arbitration).

In *Gilmer*, the Supreme Court found that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” 500 U.S. 20, 26 (1991). *Gilmer* also explained that the burden is on the party opposing enforcement of an arbitration agreement to “show that Congress intended to preclude a waiver of a judicial forum” through the statutory text, legislative history, or because an inherent conflict between arbitration and statute’s purpose exists. *Id.* The Court concluded that claims under statutes like the ADEA advancing important public policies may be arbitrated as long as the “prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum . . . .” *Id.* at 28.

The Supreme Court also has rejected a variety of challenges to arbitration procedures based on their differences from judicial procedures. Rather, the Supreme Court held that statutory claims may be arbitrated (even though the arbitral procedures are different from judicial procedures) because those differences do not prevent a party from enforcing and obtaining relief on statutory claims. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Instead of following *Gilmer* and other Supreme Court precedent on point, the Board in *D.R. Horton I* failed to treat as dispositive the question of whether an employee could vindicate his statutory rights under the FLSA effectively pursuant to the arbitration agreement's procedures. See *D.R. Horton I, supra*, at 12 & n.23. Instead, the Board erroneously reasoned that "the right allegedly violated by the [mandatory arbitration agreement] is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA." *Id.* at 10. This turned *Gilmer* on its head and ignored the fundamental teaching of *Gilmer* and its predecessor decisions. See *Gilmer*, 500 U.S. at 30-32; see *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims"). In further conflict with *Gilmer*, the Board in *D.R. Horton I* held that an arbitration agreement was unenforceable even if the employee could vindicate his FLSA rights effectively under it. See *D.R. Horton I, supra*, at 11-12 & n.23.

The Board in *D.R. Horton I* also failed to follow *Gilmer*'s test for determining whether Congress intended to preclude the waiver of a judicial forum and its procedures for a statutory claim. As noted above, *Gilmer* requires a court to answer this question based on the relevant

statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer*, 500 U.S. at 26. The Supreme Court has applied this test repeatedly. See *McMahon*, 482 U.S. at 227; *Mitsubishi Motors*, 473 U.S. at 628. It reaffirmed its commitment to this inquiry in *CompuCredit Corp.*, where it analyzed the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA to preclude the arbitration of CROA claims. See *CompuCredit Corp.*, 132 S. Ct. at 669. The *CompuCredit* Court also reiterated that if a statute "is silent on whether claims under [it] can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

The Board, however, never explored Congress' intention regarding the preclusion of arbitration for FLSA claims. If it had done so, it would have been compelled to find that FLSA claims are subject to arbitration. See, e.g., *Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" to "even implicitly" suggest that Congress intended to preclude arbitration of FLSA claims).

The Board in *D.R. Horton I* also failed to look for any indication in the NLRA's text or history of a congressional intent to override the FAA and require access to class procedures. Instead, the Board got the inquiry backwards and concluded that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *D.R. Horton I*, *supra*, at 14. If the Board had asked the correct question, however, it would have found that there is no language in the NLRA (or in the NLGA) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA. Indeed, the non-existence of the modern class procedures until decades after the NLRA was enacted establishes that Congress had no intention of the NLRA granting access to those

procedures. Such “silence” in the NLRA means “the FAA requires the [DRP] to be enforced according to its terms.” *CompuCredit Corp.*, 132 S. Ct. at 673.

In the end, the Board in *D.R. Horton I* declared there was “an inherent conflict” between the NLRA and the arbitration agreement’s waiver of class procedures despite a lack of any authority for and the novelty of conclusion. *See D.R. Horton I, supra*, at 13. Indeed, the Supreme Court and other federal courts have repeatedly have found no “inherent conflict” between arbitration and other statutes. *See, e.g., Gilmer*, 500 U.S. at 27-29 (no inherent conflict between arbitration and the ADEA); *Rodriguez*, 490 U.S. at 485-86 (“resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act”); *McMahon*, 482 U.S. at 242 (no inherent conflict between arbitration and RICO’s private treble damages provision); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680-81 (5th Cir. 2006) (no inherent conflict between arbitration and USERRA); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 477-78 (5th Cir. 2002) (no inherent conflict between arbitration and the Magnuson–Moss Warranty Act).

Numerous other courts – including at least four Courts of Appeals – also have explicitly declined to follow the Board’s holding in *D.R. Horton I* and enforced mandatory employment arbitration agreements containing class action waivers. *See D.R. Horton II*, 737 F.3d at 362 (“The NLRA should not be understood to contain a congressional command overriding application of the FAA.”); *Murphy Oil II*, 808 F.3d at 1016 (“[A]n employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration”); *Cellular Sales*, 824 F.3d at 772; *Owen*, 702 F.3d at 1055 (rejecting plaintiff’s “invitation to follow the NLRB’s rationale in *D.R. Horton*” and enforcing arbitration agreement containing class action waiver); *Patterson v. Raymours Furniture Co., Inc.*,

2016 WL 4598542; *Sutherland*, 726 F.3d at 297 n.8 (declining to follow the Board’s decision in *D.R. Horton*); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) (enforcing class action waiver in arbitration agreement and favorably citing *D.R. Horton II*), *cert. denied*, 134 S. Ct. 2886 (2014); *Murphy Oil I*, *supra*, at 36 n.5 (Johnson, dissenting) (citing to dozens of federal and state courts rejecting *D.R. Horton I*); *but see Morris v. Ernst & Young*, 2016 WL 4433080 and *Lewis v. Epic Systems*, 823 F.3d 1147.

Moreover, the cases relied upon by the Board in *D.R. Horton I* fail to support its unfounded conclusion. For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court noted that some lower courts had applied the “mutual aid or protection” clause to protect employees from retaliation for “resort[ing] to administrative and judicial forums” in seeking to improve their working conditions. Nonetheless, the Supreme Court expressly reserved the question of “what may constitute ‘concerted’ activities in this context.” *Id.* at 566 n.15.

Similarly, the Board’s reliance on its decision in *Salt River Valley Water Users Association*, 99 NLRB 849 (1952) is misplaced. *Salt River Valley* only makes clear that an employee’s Section 7 right to “resort to judicial forums” is correctly understood as a right to assert legal rights collectively. That is not the same thing as a right to invoke judicial or arbitral procedures for a collective adjudication of individual claims.

In *Salt River Valley*, a number of employees believed they were due back pay under the FLSA and grew dissatisfied when their union did not pursue the issue. 99 NLRB at 863-64. The employees enlisted “the support of others in a movement to recover back pay and overtime wages.” *Id.* at 863. To that end, one of the complaining employees circulated a petition among his co-workers through which they designated him their agent “to take any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise” and authorized him to employ an attorney to represent them. *Id.* at 864.

Both the union and the employer learned of the petition, opposed it, and, shortly thereafter, the “agent’s” employment was terminated. Significantly, the employees’ protected concerted activities in *Salt River Valley* occurred outside of any adjudicatory proceeding and did not utilize or depend on any class litigation procedures.

The other decisions relied upon by the Board in *D.R. Horton I* similarly lack any support for the proposition that employees have a Section 7 right to seek a collective adjudication of their claims. Rather, those cases, like *Salt River Valley*, simply demonstrate the general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of their employment. *See D.R. Horton I, supra*, at 2-3 & n.3.<sup>7</sup> In fact, the best the Board could do was cite decisions pre-dating the Supreme Court’s decision in *J.I. Case* in which various individual employment agreements were held unlawful under the NLRA because employers used them to violate certain specific, well-defined rights granted employees in Section 7 (e.g. bargaining, union membership) – as opposed to the general “right to engage in

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<sup>7</sup> *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union’s filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in a lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union’s pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee’s arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

protected concerted action.” *D.R. Horton I, supra*, at 4-5 & n.7.<sup>8</sup> The Supreme Court, however, did not void the individual agreements, but only held that their existence did not excuse the employer from bargaining collectively because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 336-38 (1944). Accordingly, these decisions showed only that there was a brief period before the Supreme Court’s landmark decision in *J.I. Case* during which courts invalidated individual agreements that employers used in willful attempts to avoid collective bargaining and interfere with well-defined and specific Section 7 rights. The difference between the cases cited in *D.R. Horton I* that involved union animus and an employer’s routine use of judicially sanctioned arbitration agreements with a class action waiver is stark and establishes the Board’s lack of legitimate supporting authority. *See Concepcion*, 131 S. Ct. at 1748; *Circuit City Stores*, 532 U.S. at 122-23 (“there are real benefits to the enforcement of arbitration provisions” in employment litigation).

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<sup>8</sup> *See, e.g., Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (individual agreements served “to forestall union activity” and “create a permanent barrier to union organization”); *NLRB v. Adel Clay Prods. Co.*, 134 F.2d 342, 345 (8th Cir. 1943) (individual contracts served “as a means of defeating unionization and discouraging collective bargaining”); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (under individual employment agreements, “the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration”); *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941) (individual contracts were unlawful where they waived employees’ right to bargain collectively for a period of two years and were “adopted to eliminate the Union as the collective bargaining agency” of employees); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts were part of employer’s plan to discourage unionization); *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169, 173 (7th Cir. 1941) (individual employment agreements were promulgated to circumvent union and required each employee to refrain from requesting a raise in wages, which “deprive[d] the employee of the right to designate an agent to bargain with reference thereto”).

**D. The Board's Unreasonable Interpretation Of The Act In *D.R. Horton I* Conflicts With Public And Judicial Policy Favoring Arbitration.**

The Board in *D.R. Horton I* erroneously found “[e]mployees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively” because unnamed class members can be protected by the named plaintiff and viewed such procedures as a potential “weapon” for employees to exert group pressure on employers.<sup>9</sup> See *D.R. Horton I*, *supra*, at 2 and n. 3. The Act and Board law make clear, however, that an employer may legitimately blunt economic weapons utilized by employees.<sup>10</sup> The Board’s decision in *D.R. Horton I* also ignores that class action litigation procedures serve to allow courts to balance the interests of judicial efficiency with the demands of due process in adjudicating claims common to multiple litigants – not to increase employee bargaining power. Compare 1 McLaughlin on Class Actions §1:1 (8th ed.) (explaining class actions are “a mechanism for a single, binding adjudication of multiple claimants’ rights, while assuring due process to absent class members and repose to defendants”) with *NLRB. v. City Disposal Sys. Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 1513 (1984) (“[I]n enacting § 7 of the NLRA, Congress sought generally to

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<sup>9</sup> *D.R. Horton I* did not identify any evidence to support this proposition and only cited to a single decision that addressed potential retaliation against employees who intended to participate in a strike (not a class action) against their employer. See *Special Touch Home Care Servs.*, 357 NLRB No. 2 (2011).

<sup>10</sup> See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (“Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power”); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) (“[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3)”); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 499-500 (1960) (“[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board’s entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced”).

equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment”). Just as the NLRA permits employers to blunt the effectiveness of a strike, it also permits an employer to implement an arbitration agreement that blunts employee efforts to impose higher litigation costs on the employer to extract higher settlements.

Furthermore, the modern class action procedures in the Federal Rules allowing for absent, unnamed class members and “opt out” procedures, did not even exist in federal courts until 1966 (almost three decades after the enactment of the NLRA). *See Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-547 (1974). Even now, members of FLSA, ADEA, and Equal Pay Act collective actions, which are not subject to Rule 23, still must file an individual consent with the court to join any putative collective action – thereby eliminating any anonymity. Thus, *D.R. Horton I*’s assumption that “named employee plaintiffs” could protect unnamed class members misses the mark.

The Board in *D.R. Horton I* also failed to recognize that most employment claims amenable to class treatment involve fixed, statutory employment rights (e.g. Title VII, ADEA, ADAA, FLSA), not obligations dependent on employee Section 7 rights or individual or collective bargaining power. *See Holling Press, Inc.*, 343 NLRB 301, 303 n.15 (2004) (employee could seek protection under the anti-retaliation provisions of anti-discrimination statute even though her conduct was not protected under the NLRA). These statutes mandate certain terms and conditions of employment as a matter of law and almost universally contain anti-retaliation provisions and one-way fee-shifting provisions that help individual employees effectively pursue claims. *See, e.g.*, 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 12203; 29 U.S.C. § 215(a)(3); *see also* 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 12205; 29 U.S.C. § 216(b). As a result, employees pursue

individual claims with great frequency.<sup>11</sup> Moreover, the EEOC, the DOL, and other federal and state agencies remain empowered to pursue class or collective actions on behalf of employees in appropriate cases, irrespective of arbitration agreements waiving such procedures. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (noting that “a promising alternative to class action treatment” is “to complain to the Department of Labor, which . . . can obtain in a suit under the [FLSA] the same monetary relief for the class members that they could obtain in a class action suit were one feasible”). Accordingly, class action waivers do not affect the substantive rights of employees to receive a full and fair adjudication of their employment claims.<sup>12</sup> *See* 28 U.S.C. § 453 (requiring each judge of the United States to swear he or she “will administer justice without respect to persons, and do equal right to the poor and to the rich”).

To the extent there is such a thing as “concerted legal activity,” the Board also wrongly equated it with class or collective action procedures. *See D.R. Horton I, supra*, at 12. There are many ways in which employees may act concertedly in asserting legal claims that do not depend on, and have nothing to do with, collective adjudication procedures. For example, irrespective of individual arbitration agreements, employees can work together in asserting their common legal rights by pooling their finances, making settlement demands and negotiating as a group, sharing information, and seeking safety in numbers. Employees can also solicit other employees to assert the same alleged legal rights, act in concert to initiate multiple individual arbitrations alleging the

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<sup>11</sup> In 2015, a large percentage of the 9,041 private FLSA lawsuits filed in federal court were individual lawsuits and 89,385 individual charges alleging employment discrimination were filed with the EEOC. *See* Judicial Bus. Of the U.S. Courts, Table C-2 at p. 3, available at: <https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/> 2015/12/31; <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>12</sup> Because the Supreme Court has held that unions may waive Section 7 rights pursuant to collective bargaining agreements (including the right to strike and to a judicial forum), the illogical effect of *D.R. Horton I* is that a union can waive an individual’s rights, but that same individual cannot do so.

same legal claims, and coordinate the litigation of those claims by obtaining common representation, jointly investigating claims, testifying in each other's matters, and developing common legal theories and strategies. Thus, individual arbitration agreements do not interfere with employee Section 7 rights to provide each other "mutual aid and protection" in asserting their alleged legal rights against their employer. *See* Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. REV. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits").

The Board in *D.R. Horton I* also wrongly ignored the significant interests favoring the arbitration of employment disputes and the harm that its decision might cause.<sup>13</sup> Specifically, the Board did not acknowledge that individualized arbitration provides benefits to both the employer and the employee by providing a relatively low-cost and quick method of adjudicating disputes. *See Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). Furthermore, the

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<sup>13</sup> The Board wrongly suggested that the size of a class in employment disputes would be relatively small, unlike class actions involving commercial claims, and that its decision implicates "[o]nly a small percentage of arbitration agreements." *See D.R. Horton I, supra*, at 16. The reality, however, is that class-wide employment litigation can involve thousands (and sometimes tens or hundreds of thousands) of putative participants and that *D.R. Horton I* impacts a large percentage of the United States workforce, including every employee under the Act that is not subject to a collective bargaining agreement. *See Rindfleisch v. Gentiva Health Servs., Inc.*, 17 Wage & Hour Cas.2d (BNA) 1081, 1084 (N.D. Ga. Apr. 13, 2011) (certifying FLSA collective action of up to 10,000 employees).

Supreme Court has recognized that class arbitration is antithetical to the advantages parties expect when they agree to arbitrate and impairs the use of arbitration to achieve efficiency, confidentiality, and informality. *See Concepcion*, 131 S. Ct. at 1751 (“[C]lass arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”). The Supreme Court also has expressly recognized the benefits of arbitration in employment disputes:

We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. . . . The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

The Board in *D.R. Horton I* also incorrectly reasoned that the FAA’s savings clause permitted it to declare an arbitration agreement waiving class procedures unenforceable as contrary to public policy. In reaching this errant conclusion, the Board asked whether another federal statute might manifest a public policy that would void an arbitration agreement irrespective of the FAA. *See D.R. Horton I, supra*, at 14-16. The Board, however, erroneously treated the common law’s “public policy” balancing test as giving it broad discretion to determine for itself whether the public policies underlying the NLRA and the NLGA rendered an arbitration agreement unenforceable despite the FAA’s mandate and the absence of any indication that Congress intended to preclude individualized arbitrations. *See id.*

There is no precedent for applying this balancing test under the FAA and “[t]here is not a single decision, since [the Supreme] Court washed its hands of general common-lawmaking authority, in which [it has] refused to enforce on ‘public policy’ grounds an agreement that did not violate, or provide for the violation of, some positive law.” *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring). Because the FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution,” *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency’s own assessment of public policy and absent an equally clear congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress restricts the use of arbitration, it does so clearly). In *D.R. Horton I*, the Board improperly relied on its own determination of “public interests” rather than deferring to congressional purpose. *D.R. Horton I*, *supra*, at 14-16. Tellingly, the Board in *Murphy Oil I* did not attempt to defend this aspect of *D.R. Horton I*.

Even if it had been appropriate for the Board in *D.R. Horton I* to weigh the public policies underlying the FAA and NLRA, it did so in an unreasonable way. Without foundation, the Board equated requiring the waiver of class procedures as a condition of employment with retaliating against employees for exercising NLRA rights. *See D.R. Horton I*, *supra*, at 2-3 and n.3. There is no reasonable justification, however, for treating a mandatory arbitration agreement containing a class-action waiver as equivalent to firing an employee because she concertedly sued her employer. These agreements have been repeatedly found to be lawful and beneficial to the parties and society. As a result, when an employer declines to employ individuals who refuse to agree to individualized arbitration, it is only acting in furtherance of ends that Congress and the courts have deemed legitimate and beneficial.

### III. ALJ LAWS SHOULD GIVE THE BOARD THE OPPORTUNITY TO CORRECT ITS FLAWED DECISIONS IN *D.R. HORTON I* AND *MURPHY OIL I*.

Given the fundamental problems with *D.R. Horton I*, the Board should overturn it and its progeny. The doctrine of *stare decisis* does not require that Board decisions remain unchanged and the Board has not hesitated to overturn its flawed precedent. *See, e.g., Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) (finding that the existing standard does not adequately balance the protection of employees' rights under the NLRA and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective-bargaining agreement); *Lamons Gasket Co.*, 357 NLRB No. 72 (2011) (holding that the approach taken in a prior decision was flawed and returning to the previous rule); *Oakwood Care Center*, 343 NLRB 659 (2004) (concluding that a prior Board case was wrongly decided, and returning to previous precedent); *Levitz Furniture Co. of the Pac.*, 333 NLRB No. 105 (2001) (overturning precedent based on legal and policy reasons).

As the Supreme Court has noted:

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking. "Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."

*NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

By finding that Northrop's DRP does not violate the Act, ALJ Laws will give the Board the opportunity to remedy its past position. This would end the Board's destructive nonacquiescence to the contrary views expressed by the Second, Fifth and Eighth Circuits, and

nearly every other federal and state court that has addressed this issue.<sup>14</sup> Acquiescence will also eliminate the threat to uniformity, undue costs and burdens on private parties, courts, and the government, unnecessary confusion, and the risk of undermining the public's respect for Board orders. *See Murphy Oil II*, 808 F.3d at 1021 (warning that “[t]he Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders”) Even nonacquiescence advocates recognize there must be reasonable limits on such policies in the face of overwhelming judicial opposition to an agency's position. As two commentators have noted:

[E]ven in the absence of Supreme Court review, at some point the law in a particular circuit and across circuits will no longer be in flux. [T]he means are available under [Administrative Procedure Act]-style rationality review, possibly the [Equal Access to Justice Act] and, in egregious cases, the courts' own injunctive powers to prevent nonacquiescence that is not adequately justified.

Estreicher & Revesz, *supra*, at 727. Moreover, one Board Member has noted the following:

[R]ather than promote uniformity, the Board's policy of nonacquiescence has fostered a bifurcated system in which litigants willing to pursue their case to the appellate level are able to avoid Board orders. Thus, the Board's policy has had the unintended effect of needlessly protracting litigation, establishing a two-tier system of labor law in the same judicial jurisdiction, encouraging disrespect for Board orders, and antagonizing the courts. The two-tier system places an undue burden on those litigants who lack the resources to pursue matters to the circuit court level. Even worse, it compels them to expend resources in litigating cases in which it is clear that the appropriate circuit will

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<sup>14</sup> *See Murphy Oil I*, *supra*, at 36 n.5 (Johnson, dissenting) (citing dozens of Federal and state courts rejecting *D.R. Horton I*). Two Courts of Appeals recently have followed *D.R. Horton I*. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016). But those decisions, in turn, have generated substantial disagreement among other courts. *See, e.g., Bekele v. Lyft, Inc.*, No. CV 15-11650-FDS, 2016 WL 4203412, at \*20 (D. Mass. Aug. 9, 2016) (rejecting *Lewis* and observing “it should be noted that the Seventh Circuit's holding in *Lewis* would lead to consequences that are both odd and surely unintended”); *Bruster v. Uber Techs. Inc.*, No. 15-CV-2653, 2016 WL 4086786, at \*3 (N.D. Ohio Aug. 2, 2016) (declining to follow *Lewis*).

not enforce the Board's order. I believe it inappropriate for the Board to continue this practice.

*Arvin Indus.*, 285 NLRB 753, 762 (1987) (Chairman Dotson, dissenting). Simply put, ALJ Laws should give the Board the opportunity to refine its position on class action waivers to restore a uniform national labor policy — especially because the Board's nonacquiescence is based on its interpretation of laws and precedent outside its jurisdiction and expertise.

#### **IV. NORTHROP'S DRP DOES NOT VIOLATE THE NLRA.**

The CGC mistakenly contends that the DRP “prohibits employees from pursuing class or collective legal claims in arbitral and judicial forums” and therefore violates Section 8(a)(1) of the Act. [Joint Motion pp. 2 and 4] However, as established above, *D.R. Horton I* was wrongly decided and the NLRA does not provide employees a non-waivable right to access class procedures in litigation. Rather, the Board's finding in *D.R. Horton I* exceeds its authority, conflicts with multiple federal statutes and court precedent, and is contrary to longstanding policy favoring the private arbitration of disputes. Moreover, even if ALJ Laws applies the holding of *D.R. Horton I* in this case, Northrop's DRP is unique and distinct from the language previously addressed by the Board (and the Seventh and Ninth Circuits). Specifically, Northrop's DRP contains express exclusions, and carve-outs, not seen in previously addressed decisions.

##### **A. Northrop's Maintenance Of The DRP Does Not Violate The Act.**

The concept of requiring employees to litigate non-NLRA claims without utilizing class or collective action procedures is far from novel or extraordinary. To the contrary, multiple Circuit Courts have found such procedures lawful. *See D.R. Horton II, supra; Murphy Oil II, supra; Cellular Sales, supra; Raymours Furniture, supra; Walthour, supra.* Here, however, the legitimacy of Northrop's DRP is further established by its express exclusions, and carve outs. For example, the DRP expressly excludes from its coverage claims: “[a]s to which an agreement

to arbitrate such claims is prohibited by law; [or that are] [c]overed under the National Labor Relations Act and within the exclusive jurisdiction of the National Labor Relations Board.” [Joint Motion ¶ 5(e) and (f); Joint Exhibit 2, SOF p. 54 and Joint Exhibit 3 SOF p. 66] The DRP also expressly excludes class action waivers in jurisdictions that prohibit such waivers. Stated differently, the DRP preserves the rights of Northrop employees to bring class claims in arbitral forums where the jurisdiction at issue prohibits class waivers. [Joint Motion ¶ 5(e) and (f); Joint Exhibit 2, SOF p. 62 and Joint Exhibit 3 SOF p. 74] The DRP further makes clear that it does not in any way “limit [an employee’s] right to file a charge or complaint with a governmental agency.”<sup>15</sup> [Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67]

The language seen in Northrop’s DRP is distinct from the other cases decided by the Board on this issue. For example, the language at issue in *D.R. Horton I* provided that “all disputes and claims” must be decided “exclusively by final and binding arbitration.” *D.R. Horton I, supra*. It also stated that the arbitrator “may hear only Employee’s individual claims” and “will not have the authority to consolidate the claims of other employees” and “does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” *Id.* The language in *D.R. Horton I* also required employees to waive “the right to file a lawsuit or other civil proceeding relating to [his/her] employment with the Company. . . .” *Id.* Northrop’s DRP contains no such absolute language. To the contrary, Northrop’s DRP expressly excludes claims that cannot be arbitrated as a matter of law and all claims under the National Labor Relations Act. [Joint Exhibit 2, SOF pp. 54 and 62, and Joint Exhibit 3, SOF pp. 66 and 74] Northrop’s DRP also expressly excludes

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<sup>15</sup> The CGC has not pursued (and, thus, has waived) any claim that Northrop’s employees reasonably would construe the DRP as interfering with their right to file a charge with the NLRB or another state or federal administrative agency. [Joint Motion; Joint Exhibit 1(a)]

the waiver of class claims in jurisdictions that do not permit such waivers. [See *id.*] Accordingly, the Board's holding in *D.R. Horton I* is inapposite to the facts at issue here.

Similarly, the challenged language in *Murphy Oil I* is distinguishable from the language used in Northrop's DRP. In *Murphy Oil I*, employees were required to "waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum." *Murphy Oil I*, supra. The language in *Murphy Oil I* went on to state: "The parties agree that any claim by or against Individual or the Company shall be heard without consolidation or such claim with any other person or entity's claim." *Id.* Similar language is not seen in the express exclusions contained in Northrop's DRP, which preserve the right of Northrop employees to file actions in state or federal court where agreements to arbitrate such claims are impermissible as well as the right of Northrop employees to file class or collective actions in jurisdictions where class and collective action waivers are prohibited.

The language in Northrop's DRP also is distinct from the language at issue in *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016) and in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). In *Morris v. Ernst & Young*, the language at issue required employees to pursue legal claims "exclusively through arbitration" and "only as individuals" and in "separate proceedings." 2016 WL 443080, at \*1. The effect of such language was to prevent employees from pursuing class or collective claims in any forum at any time. See *id.* Similarly, in *Lewis v. Epic Systems Corporation*, the challenged language required employees to pursue claims only through "individual arbitration" and they "waived the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." 823 F.3d at 1150. The language seen in Northrop's DRP is not found in *Morris v. Ernst & Young* or in *Lewis v. Epic Systems Corp.* (nor is it seen in *D.R. Horton I* and *Murphy Oil I*). Unlike the language at issue in those cases, Northrop's DRP preserves employee rights to bring actions in

state or federal court (where applicable) as well as the right of employees to bring class claims in arbitration if mandated by the applicable jurisdiction. The DRP also preserves employee Section 7 rights as well as the right to file charges with governmental agencies. Accordingly, ALJ Laws should not feel compelled to follow the Board's decisions in *D.R. Horton I* and *Murphy Oil I*. Northrop's DRP is unique and should be analyzed as such.

Significantly, the DRP also expressly ensures that its participants can enforce and pursue all other rights and claims related to their employment with Northrop. Potential claims that can be fully pursued through arbitration under Northrop's DRP include claims for:

- Wages and other compensation due;
- Breach of any contract or covenant, express or implied;
- Personal injury, defamation, or other tort claims;
- Unlawful discrimination or harassment, including, but not limited to, discrimination or harassment based on race, sex, religion, national origin, age, disability, or any other status as protected and defined by applicable law;
- Unlawful retaliation;
- Benefits; and
- Violations of applicable federal, state, or local law, statute, ordinance, or regulation.

[Joint Exhibit 2, SOF p. 55 and Joint Exhibit 3, SOF p. 67] Moreover, current (or former) employee participants in the DRP can pursue their claims without incurring the costs associated with filing a complaint in state or federal court. Instead, Northrop pays the expenses associated with the arbitrator under the DRP. [Joint Exhibit 2, SOF p. 60 and Joint Exhibit 3, SOF p. 72] Thus, Northrop's DRP provides a less expensive and more expeditious means for employees to pursue any employment-related claims than filing civil actions in state or federal court that can take multiple years to conclude.

**B. Northrop's Enforcement Of The DRP Did Not Violate The Act.**

The CGC also erroneously argues that Northrop's successful transfer of Charging Party Porfiria Vasquez's claims to the appropriate arbitral forum via a Motion to Compel Arbitration was unlawful. The Supreme Court has explained the limits on the Board's power to deem employer litigation an unfair labor practice. As summarized by the Fifth Circuit,

To be enjoinable . . . the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law."

*Murphy Oil*, 808 F.3d at 1021 (quoting *Bill Johnson's Restaurants*, 461 U.S. at 737 n.5.)

Here, the District Court granted Northrop's Motion to Compel Arbitration, establishing that Northrop's Motion was both legally sound and factually appropriate. Indeed, the District Court's decision should collaterally estop the NLRB's actions in this case. *See NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 38 (1st Cir. 1987) (finding the Board was collaterally estopped from re-deciding contract-formation issues already decided by the district court).

Moreover, there is no basis to find Northrop's enforcement of the DRP was baseless, retaliatory, or in pursuit of an illegal objective. As the Fifth Circuit has explained:

[T]he Board's holding is based solely on *Murphy Oil*'s enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

*Murphy Oil*, 808 F.3d at 1021.

Northrop relied on multiple federal and state court decisions in moving to compel arbitration under the DRP. Although the Board may disagree with those decisions, that disagreement does not mean Northrop had no basis in fact or law or an “illegal objective” by relying on them. This is particularly the case given the multiple Circuit Court decisions (including *D.R. Horton II*, *Murphy Oil II*, *Cellular Sales*, and *Raymours*) that remain good law and fully support Northrop’s Motion to Compel. The Supreme Court also has repeatedly made clear that agreements like the DRP, even if they include class or collective action waivers, are lawful and enforceable under federal law. *See Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013) and *Concepcion*, 131 S.Ct. 1740. Accordingly, Northrop’s exercise of its constitutional right to petition the district court in the Federal Court Action with a legally sound Motion to Compel Arbitration did not violate the NLRA.

The record also establishes that Northrop has not taken any punitive or disciplinary action against any current or former employee (including Charging Party) that has attempted to assert a class action. [Joint Motion ¶ 5(p)] Instead, Northrop simply corrected Charging Party’s procedural error by filing a Motion to Compel Arbitration. Northrop is fully participating in the adjudication of her substantive employment claims in that arbitral forum. Indeed, the arbitration is scheduled to begin on April 24, 2017. [Joint Motion ¶ 5(n); Joint Exhibit 9] As a result, there is no basis from which to conclude that the DRP has resulted in an adverse action (of any kind) or otherwise constitutes unlawful retaliation under the NLRA.

Notably, Charging Party was the only named plaintiff in both her initial and amended Complaints in the Federal Court Action and was not acting collectively with other employees to enforce their legal rights. As a result, the granting of Northrop’s Motion to Compel Arbitration had no effect on Charging Party’s Section 7 rights. To the contrary, Charging Party is acting concertedly in connection with her arbitration and has expressed her intent to utilize the

assistance of both current and former Northrop employees to support her claims. [Joint Motion ¶¶ 5(i), (j), (n) and (o); Joint Exhibits 4, 5, 9 and 10] Thus, in actuality, Northrop's DRP has sparked – not quashed – the exercise of Charging Party's Section 7 rights.

### CONCLUSION

As demonstrated above, Northrop's DRP does not interfere with any rights afforded employees under the NLRA. Instead, federal statutes and binding Supreme Court precedent mandate a finding that the DRP is lawful. The DRP also advances the longstanding policies favoring the private arbitration of disputes and benefits its participants by ensuring they have an expeditious and cost effective mechanism to pursue their legal rights. While ALJ Laws should stay these proceedings until the Supreme Court determines whether the CGC's theories are viable, if she decides to address the Complaint on its merits, she should dismiss it in its entirety and find that Northrop's DRP does not violate the Act as alleged.

Dated October 21, 2016

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on October 21, 2016 a copy of the foregoing RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE has been filed via electronic filing with:

Division of Judges  
San Francisco Office  
901 Market Street, Suite 300  
San Francisco, California 94103-1779


Copy of the foregoing served via U.S. Mail on October 21, 2016:

*For the Division of Judges:*  
Administrative Law Judge Eleanor Laws  
Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

Copy of the foregoing served via email on October 21, 2016:

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\_\_\_\_\_  
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